UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 5

Docket No. NY-315H-05-0133-X-1

Eric D. Cunningham,

Appellant,

v.

Office of Personnel Management,

Agency.

January 23, 2009

Camille M. Abate, New York, New York, for the appellant.

Risa Cherry, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board pursuant to a recommendation of the administrative judge that the Board vacate the initial decision that dismissed the appeal as settled and reinstate the appeal. For the reasons set forth below, we GRANT the petition for enforcement, VACATE the October 28, 2005 initial decision, and FORWARD the case to the New York Field Office for further proceedings.

BACKGROUND

¶2 In 2005, the appellant filed an appeal of an agency action terminating him during his probationary period from his GS-11 criminal investigator position with the agency's Office of Inspector General. MSPB Docket No. NY-315H-05-0133-

I-1, Initial Appeal File (IAF), Tab 1. Because she found that the appellant had made nonfrivolous allegations of marital status discrimination, the administrative judge held a hearing and, thereafter, determined that the Board had jurisdiction over the appeal. *See* MSPB Docket No. NY-315H-05-0133-I-2, IAF, Tab 19 (Initial Decision). The parties then entered into a settlement agreement. *Id.*, Tab 18; Compliance File (CF), Tab 1, Exhibit A. In an October 28, 2005 initial decision, the administrative judge found that the parties, who were both represented by counsel, understood the terms of the agreement, that the agreement was freely entered into, and that it was lawful. IAF, Tab 19. Pursuant to the terms of the settlement agreement, the administrative judge entered it into the record so that it could be enforced by the Board. *Id.*

¶3 Among other things, the agreement contained a provision entitled a "Confidentiality Agreement" in which the agency agreed to keep the "terms, amount, and facts of [the] Agreement completely confidential, except to the extent disclosure may be required by law, regulation, subpoena or court order." CF, Tab 1, Exhibit A. The agreement also contained a provision providing that the SF-50 documenting the appellant's termination would be replaced with an SF-50 indicating that he resigned from the agency. *Id.*

¶4 Thereafter, the appellant obtained a position as an investigator for United States Investigation Services (USIS), a private company that conducts investigations for various entities, including the agency. CF, Tab 10, Exhibit A. Because he would be providing investigative services for the agency, the appellant was subject to a background investigation and suitability/security determination by the agency. *Id.*, Exhibit D at 4. The content of various agency employees' statements to the background investigator are the subject of this petition for enforcement.

¶5 According to the appellant's petition for enforcement, the agency breached the settlement agreement when: 1) a former supervisor, Jill Maroney, referred an investigator to the agency representative in the initial appeal, Tim Watkins, and not the Director of the Human Resources Office; and 2) another former

supervisor (now retired from the agency), Charles Focarino, and Watkins told an investigator that the appellant had been terminated and had filed an MSPB appeal. CF, Tab 1 at 3. In his petition for enforcement, the appellant sought "[p]ast and future economic damages," "[r]einstatement at OPM or any other government agency in a position commensurate in grade and pay with the position he lost," and $500,000 in punitive damages. *Id.* at 4.

¶6 In response to the petition for enforcement, the agency asserted that: 1) the statements allegedly made by Watkins and Maroney did not violate the settlement agreement because they were "required by law;" 2) any statements made by Focarino, a private citizen, "would have been made in his personal capacity and were not covered by the parties' [a]greement;" and 3) inquiries made in the course of a background investigation are not the same as employment references. CF, Tab 7 at 3. Finally, OPM argued that the Board lacked the authority to award the damages sought by the appellant. *Id.*

¶7 In her July 16, 2008 recommendation, the administrative judge thoroughly set forth the relevant facts and law and concluded that the agency breached the settlement agreement, that the breach was material, and that, as a result, the appellant was entitled to rescission of the settlement agreement and reinstatement of his appeal.[1] CF, Tab 12. The administrative judge recommended that the Board vacate the October 28, 2005 initial decision dismissing the appeal as settled and reinstate the appellant's appeal. *Id.* at 9. Because the administrative judge found that the agency had breached the settlement agreement, the petition for enforcement was referred to the Board's Office of General Counsel.

ANALYSIS

¶8 The Board has the authority to enforce a settlement agreement which, like the agreement in this case, has been entered into the record. *Perkins v.*

[1] The administrative judge correctly found that the Board lacked authority to award the past and future pay, reinstatement, and punitive damages sought by the appellant. CF, Tab 12 at 9, n.2. *See Principe v. U.S. Postal Service*, 101 M.S.P.R. 626, ¶ 3 (2006).

Department of Veterans Affairs, 106 M.S.P.R. 425, ¶ 4 (2007), *aff'd*, 273 Fed. App'x 957 (Fed. Cir. 2008); *Richardson v. Environmental Protection Agency*, 5 M.S.P.R. 248, 250 (1981). As the party asserting noncompliance, the appellant bears the burden of proving by preponderant evidence that the agency breached the settlement agreement. *Perkins*, 106 M.S.P.R. 425, ¶ 4; *Vaughan v. U.S. Postal Service*, 77 M.S.P.R. 541, 546 (1998). Following the appellant's filing of a petition for enforcement, the agency must produce relevant, material evidence of its compliance with the agreement. *Rivera v. U.S. Postal Service*, 107 M.S.P.R. 542, ¶ 4 (2007); *Vaughan*, 77 M.S.P.R. 541, 546 (1998).

¶9 In the instant case, the agency disagrees with the administrative judge's recommendation that it breached the parties' settlement agreement and argues that the Board should reverse the administrative judge's recommendation. Compliance Referral File (CRF), Tab 2. In its submission to the Board, the agency argues that the appellant waived the nondisclosure provision contained in the settlement agreement and that, even if the appellant did not waive the nondisclosure provision, OPM's disclosures to the background investigator "served the public's interest in a thorough suitability investigation that supersedes [the] [a]ppellant's interest in enforcing the settlement agreement." *Id.* at 3-4. Despite being informed of his right to respond to the agency's submission in both the administrative judge's July 16, 2008 recommendation and Clerk of the Board's August 19, 2008 acknowledgment order, the appellant has not responded to the agency's submission. *See* CF, Tab 12 at 10, CRF, Tab 3 at 2-3.

The Board need not consider the agency's evidence and argument regarding the appellant's purported waiver of the confidentiality provision in the settlement agreement.

¶10 The agency argues in its submission to the Board that, in connection with his employment at USIS, the "[a]ppellant signed an 'Authorization for Release of Information' which authorized 'any investigator' conducting 'any background investigation' to obtain 'any information relating to [the appellant's] activities from individuals, … employers, or other sources." CRF, Tab 2 at 3, *quoting*,

CRF, Tab 2, Exhibit A. According to the agency, the authorization form signed by the appellant also authorized the release of information about the appellant's "performance, disciplinary, employment history." *Id.* Further, according to the agency, the authorization form authorized the "sources of information pertaining to [him] to release such information upon the request of the investigator … regardless of any previous agreement to the contrary." *Id.* The agency filed with its submission to the Board a copy of the Authorization for Release of Information signed by the appellant. *See* CRF, Tab 2, Exhibit A.

¶11 It is well settled that the Board will not consider arguments raised for the first time on petition for review of an initial decision absent a showing that the argument is based on new and material evidence that was not previously available despite due diligence. *Coradeschi v. Department of Homeland Security*, 109 M.S.P.R. 591, ¶ 7 (2008); *Fiacco v. Office of Personnel Management*, 105 M.S.P.R. 193, ¶ 18 (2007); *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). Similarly, the Board will not consider evidence submitted for the first time on petition for review absent a showing that it was unavailable before the record closed despite the party's due diligence. *Vores v. Department of Army*, 109 M.S.P.R. 191, ¶ 9 (2008); *Matson v. Office of Personnel Management*, 105 M.S.P.R. 547, ¶ 15 (2007); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). These principles have been applied to compliance proceedings. *Warren v. Department of the Navy*, 70 M.S.P.R. 677, 679 (1996) (holding that the Board would not consider evidence submitted by the appellant for the first time on petition for review of a compliance initial decision); *Davis v. Department of Veterans Affairs*, 69 M.S.P.R. 627, 631-32 (1996) (holding that the Board would not consider an argument raised for the first time in the petition for review of a compliance initial decision).

¶12 In the instant case, the agency did not argue before the administrative judge that it had not breached the settlement agreement because the appellant had signed the Authorization for Release. *See* CF, Tab 7. Nor did the agency submit a signed copy of the Authorization to the administrative judge. *See Id*. There is

no suggestion in the record that the signed Authorization was unavailable to the agency despite due diligence while this matter was pending before the administrative judge. Likewise, nothing suggests that the agency could not have made its argument regarding the Authorization to the administrative judge. Accordingly, consistent with established Board precedent, we will not consider this evidence or argument further.

Under the facts of this case, the public interest in allowing OPM to conduct thorough background and suitability determinations does not outweigh the appellant's interest in enforcing the terms of the parties' settlement agreement.

¶13 As stated above, in its submission to the Board, the agency argues that the disclosures to the background investigators "served the public's interest in a thorough suitability investigation" and that the public interest superseded the "[a]ppellant's interest in enforcing the settlement agreement." CF, Tab 2 at 4. The agency also asserts that the background investigation was done pursuant to the agency's exercise of its authority delegated from Congress and the President to conduct suitability determinations.[2] *Id.* The agency cites the Board's decision in *Gizzarelli v. Department of the Army*, 90 M.S.P.R. 269 (2001), in support of its position.

¶14 In *Gizzarelli*, the parties resolved a removal appeal with a settlement agreement that provided, among other things, that the employing agency would only provide prospective employers with the information about Ms. Gizzarelli permitted under 5 C.F.R. § 293.311(a). *Id.*, ¶ 2. Thereafter, Ms. Gizzarelli was appointed to a position with another federal agency and was subjected to an OPM

[2] As discussed in detail in this opinion and order, the Board will not consider an argument that was not raised before the administrative judge absent a showing that it is based on new evidence not previously available despite due diligence. In its submission to the administrative judge, the agency argued that its disclosures did not constitute a breach of the settlement agreement because the disclosures were required by law. Giving the agency every benefit of the doubt, based on the argument presented to the administrative judge, we find that the agency's argument was raised below. Thus, we will consider it.

background investigation. *Id.*, ¶ 3. As part of its investigation, OPM requested information from the Army's Crime Records Center and, in response, the Army provided a Military Police report which stated that Ms. Gizzarelli had acknowledged stealing government property, transporting the stolen property in a government-owned vehicle, and using agency employees to remodel her home. *Id.*, ¶¶ 3-4. The report further stated that, based on Ms. Gizzarelli's statements and other evidence, the military police found probable cause to believe that she had committed criminal offenses. *Id.*, ¶ 4.

¶15 In her petition for enforcement, Ms. Gizzarelli complained that the Army had breached the settlement agreement by providing the Military Police report to OPM. *Id.*, ¶ 5. In its decision, the Board discussed OPM's responsibility to protect the public interest by investigating the suitability of individuals holding a position of public trust and found that, under the circumstances in the *Gizzarelli* matter, "public policy overrides the terms of the settlement agreement." *Id.*, ¶ 15. The Board went on, however, to make clear that the holding in the *Gizzarelli* decision was limited. The Board stated as follows:

> Lest there be any confusion, we wish to plainly state that we are not finding that OPM can obtain personnel records related to misconduct or performance where a settlement agreement prevents the release of such personnel records. Nor are we finding that any agency can get the appellant's criminal investigative file for any purpose. Rather, we are limiting our holding to a finding that we will not read a settlement agreement to preclude OPM, by virtue of its statutory and regulatory authority to investigate candidates for federal employment, from obtaining police or criminal records as part of a background check or suitability determination where OPM and the employing agency determine, based on the appropriate risk factors, that such records are needed to assess the suitability of an applicant for a federal job.

Id., ¶ 23.

¶16 The Board further stated that its decision in *Gizzarelli* was narrowly tailored to the circumstances and was not intended to implicate cases such as *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368 (Fed. Cir. 1999), *King v. Department of the Navy*, 130 F.3d 1031 (Fed. Cir. 1997), and *Thomas v.*

Department of Housing & Urban Development, 124 F.3d 1439 (Fed. Cir. 1997). *Gizzarelli*, 90 M.S.P.R. 269, ¶ 23. In those cases, the Federal Circuit found that agencies had breached settlement agreements by disclosing performance or conduct issues to prospective employers, including, in one case, an Inspector General investigation, or not correcting records maintained by OPM and the Defense Finance and Accounting Service. Thus, the holding in *Gizzarelli* is limited to where an agency discloses police or criminal information to OPM for purposes of a background check or suitability determination where OPM and the employing agency determine, based on appropriate risk factors, that such records are needed to assess an applicant's suitability for federal employment. It does not apply to information, such as was disclosed in the instant case, about performance or non-criminal conduct issues. The agency cites no other Board decisions to support its position, and we are unaware of any cases supporting the agency's argument.

The agency materially breached the settlement agreement.

¶17 The record shows that Watkins told the background investigator that the appellant filed a Board appeal alleging that he (the appellant) was improperly discharged and that he (Watkins) helped represent the agency in that proceeding. CF, Tab 11 at 18. In her recommendation, the administrative judge correctly observed that the record also shows that Watkins disclosed to the investigator that the parties reached a settlement agreement and that an SF-50 reflects that the appellant resigned from the agency without a termination pending. CF, Tab 12 at 7-8. Based on Watkins' statements to the investigator, the administrative judge recommended that the Board find that the agency breached the settlement agreement. *Id*. at 8. The agency does not challenge that particular portion of the recommendation.

¶18 We agree with the administrative judge's recommendation. As discussed above, under the terms of the parties' settlement agreement, OPM agreed to keep the "terms, amount, and facts of [the] Agreement completely confidential." CF, Tab 1, Exhibit A. A review of Watkins' disclosure to the background

investigator shows that, reduced to its essence, he told the investigator that the appellant was separated from the agency, he filed an MSPB appeal, a settlement agreement was reached, and the appellant's record now shows that he resigned. CF, Tab 11 at 18. It takes little reasoning to conclude from Watkins' statements to the investigator that a provision of the settlement agreement before the Board was the removal of the separation from the appellant's record and its replacement with a resignation. Thus, Watkins breached the settlement agreement by failing to keep the terms and facts of the settlement agreement confidential.

¶19 In her recommendation, the administrative judge found that the agency's breach was material. We agree. The agency's promise of confidentiality regarding the terms and facts of the settlement agreement goes to the essence of the settlement agreement. *Thomas*, 124 F.3d at 1442.

This matter is forwarded to the administrative judge for further proceedings.

¶20 As correctly stated by the administrative judge, when a party to a settlement agreement materially breaches the agreement, the non-breaching party may elect either to enforce the terms of the agreement or to rescind the agreement and reinstate the appeal. *Powell v. Department of Commerce*, 98 M.S.P.R. 398, ¶ 14 (2005); *Betterly v. Department of Veterans Affairs*, 47 M.S.P.R. 63, 66 (1991). However, an order of enforcement would not be an effective remedy in this case. *See Diehl v. U.S. Postal Service*, 82 M.S.P.R. 620, ¶ 14 (1999). Therefore, the appellant is entitled to rescind the agreement and reinstate his appeal.

ORDER

¶21 Accordingly, the initial decision dismissing the appeal pursuant to the settlement agreement is VACATED and the case is FORWARDED to the New York Field Office where the appellant shall be provided the option of rescinding the agreement and reinstating his appeal. If he chooses that option, he must reimburse the agency for any payments he received in connection with the settlement agreement. *See Powell*, 98 M.S.P.R. ¶ 15. In the event that immediate reimbursement does not occur, the Board has the authority to enforce compliance at the conclusion of Board proceedings on the appeal. *Stipp v. Department of the Army*, 64 M.S.P.R. 124, 128 (1994), *overruled on other grounds by Wisdom v. Department of Defense*, 78 M.S.P.R. 652, 656 (1998).

¶22 This is the final order of the Merit Systems Protection Board in this enforcement proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b)(3) (5 C.F.R. § 1201.183(b)(3)).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.